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THE STATE SENATE
Monday, February 26, 2007

Committee Substitute for
Senate Bill No. 980

COMMITTEE SUBSTITUTE FOR SENATE BILL NO. 980 - By: LAMB of the Senate and DUNCAN of the House.

An Act relating to property; establishing the Oklahoma Discretionary and Special Needs Trust Act; providing short title; defining terms; establishing requirements for certain trusts; establishing requirements for transfer of certain trusts; stating consequences of certain provisions; defining certain interests; stating effects of certain interests; stating requirements of specified trusts; stating requirements of specified interests; providing for termination of certain provisions; providing for codification; and providing an effective date.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 175.81 of Title 60, unless there is created a duplication in numbering, reads as follows:

This act shall be known and may be cited as the "Oklahoma Discretionary and Special Needs Trust Act".

SECTION 2. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 175.82 of Title 60, unless there is created a duplication in numbering, reads as follows:

As used in this act:

1 1. "Beneficial interest" means a distribution interest or a
2 remainder interest, and excludes a power of appointment or a power
3 reserved by the settlor;

4 2. "Beneficiary" means a person who has a present or future
5 beneficial interest in a trust, vested or contingent. However, the
6 holder of a power of appointment shall not be considered a
7 beneficiary;

8 3. "Current distribution interest" means a distribution
9 interest where on the date of qualification the beneficiary is an
10 eligible distributee or permissible distributee of trust income or
11 principal;

12 4. "Distribution interest" means a beneficiary's equitable
13 interest to enforce the distribution terms of the trust subject to
14 the judicial review standard. A distribution interest is classified
15 as a mandatory interest, a support interest, a discretionary
16 interest, or a combination of any such interests. A distribution
17 interest includes both current distribution interests and future
18 distribution interests;

19 5. "Exception creditor" means a creditor who is allowed to
20 reach a support interest as exclusively prescribed by the remedies
21 in this act;

22 6. "Future distribution interest" means all distribution
23 interests other than a current distribution interest;

1 7. "Power of appointment" means an inter-vivos or testamentary
2 power to direct the disposition of trust property, other than a
3 distribution decision by a trustee to a beneficiary. Powers of
4 appointment are held by donees, not the settlor. A power of
5 appointment includes any right or power granted by statute to any
6 person other than the settlor;

7 8. "Remainder interest" means an interest where a trust
8 beneficiary will receive the property outright in the future; and

9 9. "Reserved power" means a power held by the settlor.

10 SECTION 3. NEW LAW A new section of law to be codified
11 in the Oklahoma Statutes as Section 175.83 of Title 60, unless there
12 is created a duplication in numbering, reads as follows:

13 The following provisions apply to all trusts under this act,
14 regardless of whether a spendthrift provision is included in a
15 trust:

16 1. A distribution interest may not be judicially sold. A
17 distribution interest in a trust includes, but is not limited to, a
18 current interest, life interest or income interest;

19 2. A remainder interest, power of appointment or a reserved
20 power in a trust may not be judicially sold;

21 3. Trust property is not subject to personal obligations of the
22 trustee, even if the trustee becomes insolvent or bankrupt;

1 4. A beneficiary of a trust has an equitable interest in the
2 trust to bring an action against the trustee to enforce the terms of
3 the trust subject to the judicial review standard; and

4 5. This act provides for the sole and exclusive remedies that
5 are available to a creditor or other non-beneficiary claiming an
6 interest in the trust.

7 SECTION 4. NEW LAW A new section of law to be codified
8 in the Oklahoma Statutes as Section 175.84 of Title 60, unless there
9 is created a duplication in numbering, reads as follows:

10 The following provisions apply to all trusts under this act:

11 1. A creditor may not attach, exercise, or otherwise reach an
12 interest of a beneficiary or any other person who holds an
13 unconditional or conditional removal or replacement power over a
14 trustee. Further, such a power is personal to the beneficiary and
15 may not be exercised by the beneficiary's creditors, nor may a court
16 direct any person to exercise such power;

17 2. A creditor may not reach an interest of a beneficiary nor
18 otherwise compel a distribution because the beneficiary is then
19 serving as a trustee or a cotrustee;

20 3. If a party challenges a settlor or a beneficiary's influence
21 over a trust, the following factors, alone or in combination, shall
22 not be considered dominion and control over a trust:

- 1 a. a beneficiary serving as a trustee or a cotrustee as
2 described in paragraph 2 of this section,
3 b. the settlor or a beneficiary holds an unrestricted
4 power to remove or replace a trustee,
5 c. the settlor or a beneficiary is a trust administrator,
6 a general partner of a partnership, a manager of a
7 limited liability company, an officer of a
8 corporation, or any other managerial function of any
9 other type of entity, and part or all of the trust
10 property consists of an interest in said entity,
11 d. a person related by blood or adoption to a settlor or
12 a beneficiary is appointed as trustee, or
13 e. a settlor's or a beneficiary's accountant, attorney,
14 financial advisor, business associate, or a friend is
15 appointed as trustee; and

16 4. The settlor or any beneficiary shall not be deemed to be the
17 alter ego of a trustee. The following factors, alone or in
18 combination, shall not be sufficient evidence for a court to
19 conclude that the settlor controls a trustee or is the alter ego of
20 a trustee:

- 21 a. any combination of the factors listed in paragraph 3
22 of this section,

- 1 b. occasional occurrences where the settlor or a
2 beneficiary may have signed checks, made disbursements
3 or executed other documents related to the trust as a
4 trustee, when in fact the settlor or a beneficiary was
5 not a trustee,
6 c. making requests for distributions on behalf of
7 beneficiaries, or
8 d. making requests to the trustee to hold, purchase, or
9 sell any trust property.

10 SECTION 5. NEW LAW A new section of law to be codified
11 in the Oklahoma Statutes as Section 175.85 of Title 60, unless there
12 is created a duplication in numbering, reads as follows:

13 A. A spendthrift provision is valid if it restrains either the
14 voluntary or involuntary transfer of a beneficiary's interest. A
15 spendthrift provision may permit the voluntary transfer of a
16 beneficiary's interest even if such transfer is subject to the
17 approval by the trustee if the trustee is not also the transferring
18 beneficiary. The trustee may honor a transfer even if such transfer
19 violates a spendthrift provision. The trustee shall not be liable
20 to either the beneficiary or the assignee whether or not the trustee
21 honors such a transfer.

22 B. If a trust provides that the interest of a beneficiary is
23 held subject to a spendthrift provision, or words of similar import,

1 it shall restrain both the voluntary or involuntary transfer of the
2 beneficiary's interest.

3 C. Except for an exception creditor of a support interest under
4 paragraph 4 of Section 8 of this act, when a trust contains a
5 spendthrift provision, a creditor or assignee of the beneficiary may
6 not reach an interest in a trust or a distribution by the trustee
7 until such distribution is received by the beneficiary.

8 D. A creditor shall wait until a distribution is received by a
9 beneficiary before attachment; provided, however, an exception
10 creditor may attach present and future distributions at the trust
11 level.

12 E. A spendthrift provision applies to both current distribution
13 interests and remainder interests.

14 F. A power of appointment in any trust is personal in nature
15 and cannot be attached or forced to be exercised by a creditor or a
16 court regardless of the presence of a spendthrift provision. A
17 power of appointment is not a property interest.

18 G. A reserved power is not protected by a spendthrift
19 provision. If a reserved power does not constitute a power of
20 withdrawal for the settlor to withdraw income or principal, the
21 holder of a reserved power may exercise the power in his or her sole
22 and absolute discretion unencumbered by any court.

23 H. A spendthrift provision is a material provision of a trust.

1 SECTION 6. NEW LAW A new section of law to be codified
2 in the Oklahoma Statutes as Section 175.86 of Title 60, unless there
3 is created a duplication in numbering, reads as follows:

4 A. A distribution interest in a trust shall be classified as a
5 mandatory interest, a support interest or a discretionary interest.
6 These definitions apply for all trusts discussed in this act:

7 1. A "mandatory interest" means a distribution interest where
8 the trustee has no discretion in determining whether the
9 distribution shall be made, or the amount or timing of such
10 distribution;

11 2. A "support interest" means any interest which is not a
12 mandatory interest or a discretionary interest. A support interest
13 shall include mandatory language such as "shall make distributions"
14 and be coupled with a standard capable of judicial interpretation,
15 such as an "ascertainable standard" as defined in Internal Revenue
16 Code (IRC) Section 2041; and

17 3. A "discretionary interest" means any interest where a
18 trustee has discretion to make or withhold a distribution. A
19 discretionary interest includes permissive language such as "may
20 make distributions" or it may include mandatory language that is
21 inconsistent with the settlor's intent to create a discretionary
22 trust, such as, "The trustee shall make distributions in the
23 trustee's sole and absolute discretion."

1 B. A beneficiary may concurrently hold a mandatory interest,
2 support interest or discretionary interest. To the extent a trust
3 contains a combination of a discretionary interest, a support
4 interest or a mandatory interest, such trust shall be a mandatory
5 interest only to the extent of the mandatory language and a support
6 interest only to the extent of such support language. The remaining
7 trust property shall be held as a discretionary interest.

8 SECTION 7. NEW LAW A new section of law to be codified
9 in the Oklahoma Statutes as Section 175.87 of Title 60, unless there
10 is created a duplication in numbering, reads as follows:

11 A. If a trust contains a spendthrift provision, a creditor may
12 not attach present and future mandatory distributions from the
13 trust. A creditor shall wait until a distribution is received by a
14 beneficiary before attachment. However, an exception creditor may
15 attach present and future distributions for child support.

16 B. If a trust does not contain a spendthrift provision, a
17 creditor may attach present and future mandatory distributions from
18 the trust at the trust level.

19 C. A beneficiary holding a mandatory distribution interest may
20 enforce such interest. A court may review a trustee's distribution
21 discretion if the trustee acts beyond the bounds of reasonableness.

1 SECTION 8. NEW LAW A new section of law to be codified
2 in the Oklahoma Statutes as Section 175.88 of Title 60, unless there
3 is created a duplication in numbering, reads as follows:

4 The following provisions apply only to support trusts:

5 1. The mere fact that a court would have exercised the
6 distribution power under a support interest differently than the
7 trustee is not sufficient reason for interfering with the exercise
8 of the distribution power by the trustee. However, a court may
9 review a trustee's distribution discretion if the trustee acts
10 beyond the bounds of reasonableness;

11 2. A support interest relies on spendthrift provisions for
12 protection of a beneficial interest as well as the additional
13 protection provided by protective or restrictive distribution
14 language under Section 10 of this act;

15 3. The only exception creditor under this act is a
16 beneficiary's child who has a judgment or court order against the
17 beneficiary for support. In this section, "child" means any person
18 for whom an order or judgment for child support has been entered in
19 this or another state;

20 4. As provided by this act, the sole and exclusive remedy of an
21 exception creditor is the attachment of the support interest at the
22 trust level. The court may limit the amount subject to attachment

1 as appropriate under the circumstances to provide for the needs of
2 the beneficiary and the beneficiary's family; and

3 5. A beneficiary of a support interest has an enforceable right
4 to a distribution pursuant to a court review. This does not raise
5 the beneficiary's interest to the level of a property interest.

6 SECTION 9. NEW LAW A new section of law to be codified
7 in the Oklahoma Statutes as Section 175.89 of Title 60, unless there
8 is created a duplication in numbering, reads as follows:

9 The following provisions apply only to discretionary interests:

10 1. A discretionary interest is neither a property interest nor
11 an enforceable right to a distribution; it is a mere expectancy;
12 provided, however, a beneficiary holding a discretionary interest
13 has an equitable interest to bring an action against the trustee
14 within the judicial review standard of paragraph 4 of Section 9 of
15 this act. No creditor, regardless of whether this act provides for
16 any exception creditors, may attach, require the trustee to exercise
17 the trustee's discretion to make a distribution, or cause a court to
18 judicially sell a discretionary interest;

19 2. Regardless of whether a beneficiary has any outstanding
20 creditor, a trustee may directly pay any expense on behalf of such
21 beneficiary and may exhaust the income and principal of the trust
22 for the benefit of such beneficiary. A trustee shall not be liable

1 to any creditor or beneficiary for paying the expenses of a
2 beneficiary;

3 3. A creditor, including an exception creditor, of a
4 beneficiary has no greater rights than a beneficiary, and may not
5 compel a distribution that is subject to the trustee's discretion,
6 nor may a court order a distribution;

7 4. A court may review a trustee's distribution discretion only
8 if it is proved by clear and convincing evidence that the trustee:

- 9 a. acts dishonestly,
- 10 b. acts with an improper motive, or
- 11 c. fails to act.

12 The sole factor not to make a distribution does not constitute a
13 failure to act. There is no standard of reasonableness under the
14 above review standard;

15 5. In addition to any limitations of creditors' rights, if the
16 trust contains a spendthrift provision, a current interest in a
17 discretionary trust also receives the benefits of any spendthrift
18 protection; and

19 6. Absent express language to the contrary, in the event that
20 the distribution language permits unequal distributions between
21 beneficiaries or distributions to the exclusion of other
22 beneficiaries, the trustee may distribute all of the accumulated,

1 accrued, or undistributed income and principal to one beneficiary in
2 the trustee's discretion.

3 SECTION 10. NEW LAW A new section of law to be codified
4 in the Oklahoma Statutes as Section 175.90 of Title 60, unless there
5 is created a duplication in numbering, reads as follows:

6 A. A trustee may only make distributions for the purposes
7 designated by the settlor. A creditor, including an exception
8 creditor, has no greater rights than a beneficiary. In this
9 respect, a creditor, including an exception creditor, cannot attach
10 present or future distributions if such creditor's claim does not
11 come within the distribution standard.

12 B. A restriction curtailing a trustee's distribution powers as
13 to a trustee making any distribution that would result in a
14 beneficiary not having an "available resource" is valid, and an
15 exception creditor may not attach present or future distributions of
16 a trust. All other restrictions curtailing a trustee's distribution
17 power are void as to exception creditors, if any exception creditors
18 are provided by this act.

19 SECTION 11. NEW LAW A new section of law to be codified
20 in the Oklahoma Statutes as Section 175.91 of Title 60, unless there
21 is created a duplication in numbering, reads as follows:

22 A. A provision that provides that a current distribution
23 interest shall become either a discretionary interest or that a

1 beneficiary's current distribution interest shall terminate upon a
2 creditor, including an exception creditor, attaching a beneficiary's
3 current distribution interest in a trust is valid.

4 B. A provision that provides a remainder interest shall
5 terminate or change into a dynasty interest upon attachment by a
6 creditor, including an exception creditor, is valid.

7 SECTION 12. NEW LAW A new section of law to be codified
8 in the Oklahoma Statutes as Section 175.92 of Title 60, unless there
9 is created a duplication in numbering, reads as follows:

10 A. Whether or not the terms of a trust contain a spendthrift
11 provision, the following rules apply:

12 1. During the lifetime of the settlor, the property of a
13 revocable trust is subject to the claims of the settlor's creditors;

14 2. A spendthrift provision is ineffective with respect to a
15 revocable trust while such trust is revocable; and

16 3. After the death of a settlor, and subject to the settlor's
17 right to direct the source from which liabilities will be paid, the
18 property of a trust that was revocable at settlor's death is subject
19 to the claims of the settlor's creditors, costs of administration of
20 the settlor's estate, the expenses of the settlor's funeral and
21 disposal of remains, and statutory allowances to a surviving spouse
22 and children to the extent the settlor's probate estate is
23 inadequate to satisfy those claims, costs, expenses and allowances.

1 B. A creditor or assignee of the settlor may reach the maximum
2 amount that can be distributed to or for settlor's benefit. If a
3 trust has more than one settlor, the amount the creditor or assignee
4 of a particular settlor may reach may not exceed the settlor's
5 interest in the portion of the trust attributable to that settlor's
6 contribution.

7 SECTION 13. This act shall become effective November 1, 2007.

8 COMMITTEE REPORT BY: COMMITTEE ON JUDICIARY, dated 2-20-07 - DO
9 PASS, As Amended and Coauthored.